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Supreme Court of the United States

October Term, 1943

No. 339

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

THE TIMES-MIRROR COMPANY,

Respondent.

Brief of Respondent, The Times-Mirror Company.

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BRIEF OF RESPONDENT.

I.

Opinion Below.

The opinion [R. 1843] of the Circuit Court of Appeals (9th Circuit) is reported

Hearst Publications, Inc. v. National Labor Relations Board and Three Other Cases, 136 F. (2d) 608.

Statement of the Case.

PROCEEDINGS BEFORE NATIONAL LABOR RELATIONS BOARD

(a) Certification Case.

In March, 1940, Los Angeles Newsboys Local Industrial Union No. 75, C. I. O. (herein called Newsboys Union) filed with the Board a Petition for Investigation and Certification of Representatives against The Times-Mirror Company (herein called Times), claiming to have been designated by

> "*all* newsboys selling the Los Angeles Times in the city limits of Los Angeles"

as their representative for collective bargaining [R. 12]. Thereafter, an amended petition was filed alleging the appropriate unit to be

> "*All* newsboys selling the Los Angeles Times within the city limits of Los Angeles *and Glendale*, California, *except* temporary newsboys, casual newsboys, and newsboys who sell Sunday only copies of the Times" [R. 22].

The Times filed a Motion to Dismiss the Petition [R. 24] and an Answer thereto [R. 26]. These pleadings denied that the newsboys were employees of the Times, challenged the jurisdiction of the Board, and denied the appropriateness of the alleged unit.

The Board ordered a hearing on the amended petition and consolidated the proceeding against the Times with similar proceedings pending against three other Los Angeles newspapers [R. 28]. A hearing was held at Los Angeles from June 10, 1940, to June 27, 1940 [R. 524,

1633]. On January 9, 1941, the Board made and filed its Decision and Direction of Election [R. 76-121], wherein it held *certain* newsboys engaged in the street sale of the Los Angeles Times to be employees of the Times, and ordered the Regional Director to conduct an election among

> "All newsboys engaged in the street sale of the Times at *established spots 4 or more* hours a day, *5 or more* days a week, *within* Los Angeles and Glendale, California, *except* temporary newsboys" [R. 121].

The Times filed Objections to the Validity of Direction of Election [R. 150], which the Board overruled [R. 164]. The election was held and an Election Report issued [R. 180]. The Newsboys Union received a majority of the votes cast [R. 183]. The Board certified the Newsboys Union as the exclusive representative of

> "newsboys engaged in the street sale of the Times at *established* spots, *4 or more* hours a day, *5 or more* days a week, *within* Los Angeles and Glendale, California, *excluding* temporary newsboys * * *" [R. 196].

(b) Complaint Case.

On October 3, 1941, a Charge was filed by the Newsboys Union against the Times, alleging the commission of an unfair labor practice, viz., the Times' refusal to bargain with the Newsboys Union [R. 260]. On this Charge the Board issued its Complaint [R. 262], to which the Times filed a Motion to Dismiss and an Answer [R. 267, 269]. The Trial Examiner denied the motion and the Board affirmed his ruling [R. 333-334]. A hearing on the Complaint and Answer was held at Los Angeles

on November 10 and November 12, 1941 [R. 1643, 1662, 1669]. This hearing was consolidated with a similar proceeding against one other Los Angeles newspaper [R. 1645].

On December 4, 1941, the Trial Examiner made and filed his Intermediate Report, finding the Times guilty of the unfair labor practice alleged, namely, refusal to bargain [R. 287, 297]. The Times duly filed Exceptions to the Intermediate Report [R. 303-315], and thereafter orally argued the same before the Board at Washington [R. 330].

On March 30, 1942, the Board rendered its Decision and Order wherein it found the Times guilty of the unfair labor practice alleged, and ordered it to cease and desist from committing the same [R. 331, 349-350].

The Times thereupon (May 1, 1942) filed with the United States Circuit Court of Appeals (9th Circuit) a Petition to Review the Order of the Board [R. 1806], to which the Board filed an Answer and Request for Enforcement [R. 1825]. The Circuit Court of Appeals (9th Circuit) on June 10, 1943, by divided court, announced its decision, setting aside the Order of the Board (136 F. (2d) 608, 614). This court upon Petition of the Board granted a writ of certiorari October 25, 1943.

BUSINESS OF THE TIMES.

The Times is the publisher of Los Angeles Times, a daily and Sunday newspaper of general circulation in the City of Los Angeles and State of California, with a limited circulation outside the state. Its daily out-of-state sales in 1939 were 1.7% of total sales [R. 522]. The Times uses wire services of Associated Press and United Press. The Times publishes numerous features pur-

chased from outside the state. Approximately 14% of the total advertising in Los Angeles Times is national advertising. Considerable newsprint and ink are purchased annually by the Times outside the State of California [R. 64-67]. The record discloses that the Times is engaged in interstate commerce.

METHOD OF STREET DISTRIBUTION AND SALES

Los Angeles Times is a morning paper, but for many years has published night editions, which appear on the streets of Los Angeles on the evening preceding the date line on the paper. These night editions are taken by night district men (employees of the Times, no one of whom is a newsboy or engaged in street sales) from the Times' publishing plant and sold to newsboys at street intersections. The newsboys thereafter resell them to the public. Morning editions of the paper are sold by morning district men who operate in a fashion similar to the night district men; their area of operation is smaller, being confined to the downtown district of Los Angeles [R. 1154-1159].

At the time of hearing in the certification case, and for more than a year prior thereto, night editions of Los Angeles Times (daily issue) were sold to the newsboys for 1½ cents per copy, and the Sunday (Saturday night) issue for 6 cents per copy [R. 1195]. The daily morning editions were sold to the newsboys for 3 cents per copy and 7½ cents per copy for the Sunday issue [R. 1169-1170]. The newsboys in turn resell the daily paper at 5 cents per copy and the Sunday issue at 10 cents per copy.

After the papers are sold to the newsboys, they pay the district men the stipulated purchase price per copy. Unsold copies may be returned for credit at the purchase price [R. 1195]. The newsboys pay for lost or stolen newspapers [R. 1194] and papers sold by them to their customers on credit [R. 1194-1195].

Statement of Questions Involved.

1. Is there substantial evidence in the record to support the finding that newsboys engaged in street sales of Los Angeles Times are Times' employees?

2. Is there substantial evidence in the record to support the finding that the unit appropriate for collective bargaining purposes consisted of

> "all newsboys engaged in the street sale of the Times at *established* spots, 4 or more hours a day, 5 or more days a week, within Los Angeles and Glendale, California, *except* temporary newsboys"?

3. Are the findings of the Board that newsboys engaging in street sales of the Los Angeles Times at established spots (as defined by the Board) are Times employees and constitute an appropriate unit for collective bargaining purposes conclusive on the court?

These questions were raised throughout all stages of the proceedings before the Board [R. 24, 26, 40, 150, 152, 154, 183, 267, 269, 303) and the Circuit Court of Appeals [R. 1830-1832].

ARGUMENT.

Summary of the Argument.

POINT ONE:

SUBSTANTIAL EVIDENCE IS MORE THAN A SCINTILLA. EVIDENCE SUFFICIENT TO CREATE A SUSPICION OF THE EXISTENCE OF THE FACT TO BE ESTABLISHED IS NOT ADEQUATE. RELEVANT EVIDENCE REASONABLY ACCEPTABLE AS ADEQUATE TO SUPPORT A CONCLUSION MUST APPEAR.

THE NATIONAL LABOR RELATIONS ACT CONTAINS NO COMPREHENSIVE DEFINITION OF THE TERM "EMPLOYEE" WHEREFORE THE COURTS WILL APPLY THE ORDINARY AND CONVENTIONAL LEGAL MEANING ASCRIBED TO THE TERM AT COMMON LAW AND BY THE COURTS IN COGNATE SOCIAL LEGISLATION.

OF THE 457 NEWSBOYS INVOLVED THE FINDING OF THE BOARD IS PREDICATED ON ISOLATED CIRCUMSTANCES AND CONDUCT RELATING TO BUT FIVE AND IGNORES UNDISPUTED EVIDENCE RELATING TO USUAL, ORDINARY AND CUSTOMARY CONDUCT AND BUSINESS TRANSACTIONS OF THE ENTIRE 457. EVIDENCE OF THE USUAL AND CUSTOMARY MANNER OF BUSINESS TRANSACTION OF THE TIMES AND THE 457 NEWSBOYS INVOLVED DEFINITELY ESTABLISHES A SERIES OF CRITERIA INCONSISTENT WITH EMPLOYER-EMPLOYEE STATUS.

POINT TWO:

THE UNIT DESIGNATED FOR COLLECTIVE BARGAINING PURPOSES IS NOT AN APPROPRIATE ONE. THE BOARD HAS ARBITRARILY AND CAPRICIOUSLY EXCLUDED TIMES VENDORS OPERATING IN THE LOS ANGELES METROPOLITAN AREA UNDER PRECISELY SIMILAR CIRCUMSTANCES AND CONDITIONS AS OTHER VENDORS

INCLUDED. THE REASON ASSIGNED BY THE BOARD FOR THIS ARBITRARY DISTINCTION IS: ALTHOUGH ALL NEWSBOYS IN THE METROPOLITAN AREA ARE ELIGIBLE FOR MEMBERSHIP, THE UNION HAS NOT PERFECTED ITS ORGANIZATION OF THE NEWSBOYS EXCLUDED, BUT HAS PERFECTED ITS ORGANIZATION OF THE NEWSBOYS INCLUDED. THE PURPOSE OF THE ACT IS VIOLATED IF ITS BENEFITS ARE CONFINED TO MEMBERS OF LABOR UNIONS AND DENIED TO NON-MEMBERS. ORGANIZATION OR NOT INTO A LABOR UNION IS NOT AN ADEQUATE STANDARD TO GUIDE THE BOARD'S DECISION.

POINT THREE:

THE FINDINGS OF THE BOARD THAT THE TIMES VENDORS ARE EMPLOYEES AND THAT THE UNIT DESIGNATED IS AN APPROPRIATE ONE ARE NOT BINDING UPON THE COURTS UNLESS SUSTAINED BY SUBSTANTIAL EVIDENCE. THE ACT APPEARS SPECIFIC IN ITS DECLARATION THAT THE FINDINGS ARE CONCLUSIVE ONLY IF SUPPORTED BY THE EVIDENCE [SECTION 10(e)]. THIS COURT HAS SO DECLARED.

THIS CASE DOES NOT INVOLVE THE APPLICATION OF THE RULE ANNOUNCED IN GRAY V. POWELL, 314 U. S. 402.

THE BOARD IS NOT HERE DETERMINING UNDER A SPECIFIC DELEGATION OF POWER WHETHER THE FACTS ARE WITHIN A SPECIFIED EXCEPTION TO A STATUTE.

POINT ONE.

There Is No Substantial Evidence to Support the Finding of the Board That Newsboys Engaged in Street Sales of the Los Angeles Times Are Employees.

PART I OF POINT ONE—

MEANING OF THE TERM "SUBSTANTIAL EVIDENCE."

The Findings of the Board Are Conclusive Only When Supported by Substantial Evidence. More Than a Scintilla Is Required. Evidence Sufficient to Create a Suspicion of the Existence of the Fact to be Established Is Not Adequate. Relevant Evidence Reasonably Acceptable as Adequate to Support a Conclusion Must Appear.

1. *National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U. S. 292, 299-300:

"Section 10(e) of the Act provides: '. . . The findings of the Board as to the facts, if supported by evidence, shall be conclusive.' But as has often been pointed out, this as in the case of other findings by administrative bodies, means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred (citing cases). Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. 'It means such relevant evidence as a reasonable

mind might accept as adequate to support a conclusion.' "

Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 229;

National Labor Relations Board v. Virginia Electric & Power Co., 314 U. S. 469, 476;

Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board, 301 U. S. 142, 147;

National Labor Relations Board v. Sun Shipbuilding & Dry Dock Co. (3 C. C. A.), 135 F. (2d) 15, 25.

PART II OF POINT ONE—
MEANING OF THE TERM "EMPLOYEE."

1. Respondent's Position.

Throughout this controversy, Respondent has maintained that:

The term "employee" was used by the Congress in the National Labor Relations Act in the ordinary and conventional legal sense as interpreted under the common law and by decisions of federal courts defining the term as used in other cognate social legislation. (Pet. Br. C. C. A. pp. 13, 14.)

2. The Board's Position.

The Board, on the other hand, has maintained that:

"contrary to petitioners' [Respondent here] contentions, common law texts and cases and statutory concepts borrowed from other legislation passed for another purpose are of no assistance in determining the scope of the statutory employment relationship." (Board's Br. C. C. A. p. 39.)

A. THE NATIONAL LABOR RELATIONS ACT CONTAINS NO COMPREHENSIVE DEFINITION OF THE TERMS "EMPLOYER" OR "EMPLOYEE."

(a) *Definitions* (29 U. S. C. A., Sec. 152):

"When used in Sections 151-166 of this Title—

(1) * * *

(2) The term 'employer' includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to Sections 151-163 of Title 45, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the chapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse."

(b) *Rules and Regulations* (29 U. S. C. A., Sec. 156):

"The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of Sections 151-166 of this Title."

B. IN THE ABSENCE IN THE ACT OF COMPREHENSIVE DEFINITION OF THE TERM "EMPLOYEE," COURTS WILL APPLY THE ORDINARY AND CONVENTIONAL MEANING ASCRIBED AT COMMON LAW AND BY THE COURTS TO COGNATE SOCIAL LEGISLATION.

(1) Except as Congress has written into the Act different standards, the federal rules protecting the federal rights created by the Act are fashioned from the common law.

Bailey, Adm'x v. Central Vermont Railway, Inc., 319 U. S. 350, 352:

"The rights which the Act [Federal Employers' Liability] creates are federal rights protected by federal rather than local rules of law (citing authorities). And those federal rules have been largely fashioned from the common law (citing authorities) except as Congress has written into the Act different standards (citing authorities)." (63 S. Ct. 1063-1064.)

(2) The legislative authority uses words in their ordinary sense and with the meaning commonly attributed to them.

Kepner v. United States, 195 U. S. 100, at 124:

"It is a well-settled rule of construction that language used in a statute which has a *settled and well-known meaning, sanctioned by judicial decision*, is presumed to be used in that sense by the legislative body."

United States v. First National Bank, 234 U. S. 245, at 258:

"That this *natural and usual signification* of plain terms is to be adopted as the legislative meaning in the absence of clear showing that something else was meant, is an *elementary* rule of construction frequently recognized and followed in this court."

United States v. Merriam, 263 U. S. 179, at 187:

"The word 'bequest' having the *judicially settled meaning* which we have stated, we must presume it was used in that sense by Congress."

Lynch v. Alworth-Stephens Co., 267 U. S. 364, at 370:

"And the *plain, obvious and rational meaning* of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."

Von Weise v. Commissioner of Internal Revenue (8 C. C. A.), 69 F. (2d) 439, at 441, certiorari denied 292 U. S. 655:

"One of the cardinal rules for construing statutes is that the words used are to be given their *common ordinary meaning* in the absence of indication in the statute or in the surrounding circumstances to the contrary; but, if a definition of the word is given in the statute, that definition is controlling."

McDonald v. United States (8 C. C. A.), 89 F. (2d) 128, at 133, certiorari denied 301 U. S. 697;

Sanborn v. Commissioner (8 C. C. A.), 88 F. (2d) 134, at 137, certiorari denied 301 U. S. 700;

Hearst Publications, Inc., et al. v. National Labor Relations Board, 136 F. (2d) 608, at 612 [R. 1848].

(3) This presumption must be indulged by the courts.

Levy's Lessee v. M'Cartee, 6 Peters (31 U. S.) 102, 110:

"The legislature *must be presumed* to use words in their *known and ordinary* signification, unless that sense be repelled by the context."

Maillard v. Lawrence, 16 How. (57 U. S.) 251;

Lake County v. Rollins, 130 U. S. 662, at 670-671;

Old Colony R. Co. v. Commissioner, 284 U. S. 552, at 560-561;

Hearst Publications, Inc., et al. v. National Labor Relations Board, 136 F. (2d) 608, at 612 [R. 1848]:

"Since the term 'employee' is not defined in the Act, we agree with petitioners' contention that it must be given its conventional meaning as developed under the common law and statutory enactments."

C. THE CONGRESS DID NOT GIVE A COMPREHENSIVE DEFINITION OF THE TERM EMPLOYEE IN:

1. *Social Security Act,* August 10, 1939, c. 666. Title IX, Section 905(a), 53 Stat. 1400; 42 U. S. C. A., Section 1011(b).

"The term 'employment' means any service of whatever nature performed within the United States by an employee for his employer, except—agricultural * * * domestic, * * *." (8 exceptions.)

2. *Federal Employers' Liability Act,* 53 Stat. 1404, August 11, 1939, c. 685, Section 1; 45 U. S. C. A., Section 51.

"Every common carrier * * * shall be liable in damages to any person suffering injury while he is employed by such carrier * * *."

3. *Fair Labor Standards Act,* 52 Stat. 1060, June 25, 1938, c. 676, Section 3; 29 U. S. C. A., Section 203.

" 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee * * *.

" 'Employee' includes any individual employed by an employer."

4. *Federal Safety Appliance Act,* March 2, 1893, c. 196 and amendments; 27 Stat. 531; 45 U. S. C. A., Sections 1-46. Apparently an entire absence of definition.

5. *Merchant Marine Act,* 41 Stat. 1007, June 5, 1920, c. 250, Section 33; 46 U. S. C. A., Section 688.

"Any seaman who shall suffer a personal injury in the course of his employment may, at his election, maintain an action for damages at law * * *."

6. *Longshoremen's and Harbor Workers' Compensation Act,* March 4, 1927, c. 509, Section 2, 44 Stat. 1424; 33 U. S. C. A., Section 902.

"The term 'employee' does not include a master or member of a crew of any vessel nor any person engaged * * * to load or unload * * * any small vessel * * *."

"The term 'employer' means an employer any of whose employees are engaged in maritime employment * * *."

7. *National Labor Relations Act,* July 5, 1935, c. 372, Section 2, 49 Stat. 450; 29 U. S. C. A. 152(3).

"The term 'employer' includes any person acting in the interest of an employer directly or indirectly * * *.

"The term 'employee' shall include any employee * * * but shall not include" an agricultural laborer, domestic servant, child or spouse.

D. In Each Instance the Courts Have Declared That Congress Used the Word in Its Ordinary Sense and Intended to Describe the Conventional Relation of Employer and Employee.

1. *Social Security Act.*

Anglim v. Empire Star Mines Co. (9 C. C. A.), 129 F. (2d) 914, 916-917:

"Applying the ordinary legal tests as the statute appears to have intended, the trial court concluded that the Leasers were independent contractors. * * * However, in defining the required relationship * * * the regulations do no more than reiterate the familiar principles of the common law."

Williams v. United States (7 C. C. A.), 126 F. (2d) 129, 132 (certiorari denied, 317 U. S. 655):

"It has been held by this and other courts that employment within the meaning of the statute connotes the legal relationship of employer and employee as those terms were defined and understood at the time of the enactment—furthermore, that an independent contractor is not an employee."

United States v. Griswold (1 C. C. A.), 124 F. (2d) 599, 601:

"We held that an employee is one who meets the test of the more or less established concept of the 'legal relationship of employer and employee.' * * *

"The relationship of employer and employee in the ordinary sense does not exist here."

Deecy Products Co. v. Welch (1 C. C. A.), 124 F. (2d) 592, 597:

"* * * The words 'employ,' 'employer' and 'employee' are to be taken in their ordinary meaning. It seems clear that the question whether a person is an employee in all cases turns on the existence of the more or less established concept of the 'legal relationship of employer and employee.'"

Jones v. Goodson (10 C. C. A.), 121 F. (2d) 176, 180:

"It must be presumed that Congress was cognizant of its well-established principles at the time of the enactment of the statute and that if different guides were intended for ascertaining whether the relationship of employer and employee existed between parties in the application of the statute, appropriate language would have been used to indicate such purpose. There is nothing in the act or its legislative history which indicates such an intent."

Indian Refining Co. v. Dallman (7 C. C. A.), 119 F (2d) 417:

"There is nothing in the Social Security Act which suggests that the terms 'employer' and 'employee' should receive anything but their *ordinary construction.*" (31 F. Supp. 460.)

2. *Federal Employers' Liability Act.*

Robinson v. B. & O. R. R., 237 U. S. 84, 94:

"We are of the opinion that Congress used the words 'employee' and 'employed' in the statute in their *natural* sense, and intended to describe the *conventional* relation of employer and employee."

Hull v. P. & R. Ry. Co., 252 U. S. 475, 479;
Wells Fargo v. Taylor, 254 U. S. 175, 187.

3. *Fair Labor Standards Act.*

Bowman v. Pace Co. (5 C. C. A.), 119 F. (2d) 858, 860:

"The strongly contested issue is whether he was an employee of the Pace Company at all. * * * It is not the purpose of the Fair Labor Standards Act to create new wage liabilities, * * *."

4. *Federal Safety Appliance Act.*

Stevenson v. Lake Terminal R. Co. (6 C. C. A.), 42 F. (2d) 357, 358-359:

"The Congressional failure to define the term 'employee' * * * has evoked a large amount of litigation. * * * and the Supreme Court has held that the term 'employee' in the Employers' Liability Act describes the *conventional* relation of master and servant."

5. *Merchant Marine Act.*

Loe v. Goldstein (9 C. C. A.), 101 F. (2d) 967, 971:

"It is evident that an injured seaman is granted a cause of action by the foregoing section only against one as to whom he occupies the *conventional* relationship of 'employee.'"

6. *Longshoremen's and Harbor Workers' Compensation Act.*

Cardillo v. Mockabee (C. C. A. D. C.), 102 F. (2d) 620, 622:

"There is nothing in the act to destroy the common law meaning of 'independent contractor.'"

7. National Labor Relations Act.

Hearst Publications, Incorporated v. National Labor Relations Board, 136 F. (2d) 608, 611-612 [R. 1843-1852]:

"The Act does not specifically define either the term 'employer' or the term 'employee,' but says simply 'the term "employee" shall include any employee.' Since the Act contains no precise definitions, the publishers contend that Congress intended to use the words in their ordinary and conventional sense as understood at the time the statute was enacted." [R. 1847.]

"Since the term 'employee' is not defined in the Act, we agree with petitioner's contention that it must be given its conventional meaning as developed under the common law and statutory enactments." [R. 1848.]

E. THAT CONGRESS USED THE TERM "EMPLOYEE" IN THE NATIONAL LABOR RELATIONS ACT IN ITS NATURAL AND CONVENTIONAL SENSE IS PERSUASIVELY INDICATED BY (1) LANGUAGE OF THE ACT; (2) RULES AND REGULATIONS IMPLEMENTING NATIONAL LABOR RELATIONS ACT; AND (3) DECISIONS AND ORDERS OF THE NATIONAL LABOR RELATIONS BOARD.

(1) *Language of the Act.*

(a) *Definitions* (29 U. S. C. A., Sec. 152):

"When used in Sections 151-166 of this title—

(1) * * *

(2) The term 'employer' includes any person acting in the interest of an employer directly or indirectly (exclusions then stated) * * *

(3) The term 'employee' shall include any employee and shall not be limited to the employees of a particular employer unless the chapter explicitly states otherwise (inclusions and exclusions then stated) * * *."

(b) *Rules and Regulations* (29 U. S. C. A., Sec. 156):

"The Board shall have authority from time to time to make, amend and rescind such rules and regulations as may be necessary to carry out the provisions of Sections 151-166 of this Title."

(2) *Rules and Regulations of Board Implementing National Labor Relations Act.*

(a) *Definitions* (29 U. S. C. A., App. p. 561):

"Sec. 201.1. Terms Defined in Section 2 of the Act. The terms * * * 'employer,' 'employee,' * * * as used herein shall have the meaning set forth in Section 2 of the National Labor Relations Act, * * *."

(3) *Decisions and Orders of the National Labor Relations Board:*

(a) *In the Matter of Houston Chronicle Publishing Co. and Houston Newsboys Union, Local 456*, 28 N. L. R. B. 1043.

Although no specific mention is made in the Board's decision of the interpretation given the term "employee" in the National Labor Relations Act, the recital of the controlling facts of record and the finding of the Board that these facts indicate these "newsboys are not 'employees' within the meaning of the Act"[1] definitely indicates that

[1] *In the Matter of Houston Chronicle Publishing Co.*, 28 N. L. R. B. 1043, 1045, 1046.

the Board was construing the term in its legal, natural and conventional meaning.

The rule of statutory construction applied in interpretation of the term "employee" as used in the National Labor Relations Act should be the same rule applied by this and other federal courts in interpretation of the term as used in other cognate social legislation. That interpretation, as the Ninth Circuit Court of Appeals announced in the instant case, is "based upon a broad policy of public benefit". [R. 1848].

PART III OF POINT ONE—

THE RECORD DISCLOSES NO SUBSTANTIAL EVIDENCE TO SUSTAIN THE FINDING THAT THE NEWSBOYS ARE EMPLOYEES.

Evidence Respecting But 5 of 457 Newsboys Involved Forms Basis of Board's Decision.

The Board found that the newsboys here involved are within the definition of employees as the term is used in the Act [R. 111].

The Regional Director found that there were 457 newsboys engaged in the street sale of the Los Angeles Times eligible to vote at the election [R. 191]. Of these 457 newsboys only 5 were called as witnesses. They were:

Robert Eley [R. 1181-1211];

John Roberts [R. 1211-1243];

Philip Tellis [R. 1243-1249];

John Fields [R. 1249-1280, 1328-1342]; and

Edward Patch [R. 1313-1328].

Upon the testimony of these 5 witnesses must be found, if it may be found, substantial evidence to sustain the Board's finding that the 457 newsboys are employees of the Times.[2]

Excerpts From Board's Decision and Direction of Elections and Evidence Assigned by Board in Support Thereof, Followed by Respondent's Comments and Quotations of Additional Undisputed Testimony by the Same Witnesses on the Same Subjects.

In its decision and direction of elections, the Board declared:

> "On the *basis of the foregoing*, we are of the opinon that the companies have the right to exercise and do exercise such *Control and Direction over the manner and means* in which the newsboys perform their selling activities as establishes the relationship of employer and employee for the purposes of the Act" [R. 108].

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[2]During the hearing, the Chief Trial Examiner at Washington advised the Trial Examiner: "'Evidence should be introduced to show that persons signing cards are employees. Burden is on Petitioner to show this fact. I assume Respondent denies card signers occupy position of employees. If so, evidence should be introduced to show what each individual does.'" [R. 1493.]

Later during the hearing the following colloquy occurred betwgen counsel for the Board and the Trial Examiner:

Mr. Mouritsen: "Let me then understand what the Trial Examiner's idea is on what further evidence should be put in, or the type of evidence."

Trial Examiner Kennedy: "Evidence should be introduced to show what each individual does. Now *I do not think* that has been done." [R. 1513.]

Notwithstanding this direction and admonition, the Board failed to produce any evidence respecting control or direction over any of the 457 Times newsboys other than the 5 above mentioned.

The preceding portion of the decision referred to is under the heading "III. Status of the Newsboys Involved in This Proceeding" [R. 88]. Reference to evidence of control and direction is indiscriminately to any one or all four of the respondent newspapers in the four cases involved. No attempt is made to state a case against any one of the four companies individually. The evidence relied upon to support the finding against the Times we have segregated. It is confined to evidence relating to isolated instances of conduct of or circumstances relating to but 5 of the 457 Times newsboys involved.

We now quote from the Board's findings the evidence (and the Board's comment) upon which the Board made its finding of "control and direction" to establish the relation of employer and employee:

Roy Eley.

1. "Shortly prior to the hearing when the Times changed its press time from 5:00 to 6:00 o'clock Roy Eley's 'order' was *reallocated* without his request by the Times' district manager with the result that Eley received the same number of papers in one delivery that he formerly got in two" [R. 94, 95].

2. Thomas McKinney, Times' district manager, did not deny that he gave the following instructions to Roy Eley, a Times newsboy, when he *first began* selling papers:

Eley related that:

"[McKinney] 'counted out a certain number of papers * * * he told me that there was one of those that was not to be charged to me, that I should leave it at the drugstore in the market, and at the same time I should go up to the liquor store just above there

where there was a certain sale, and over to the little restaurant where there was another certain sale, and then come back to the corner, to work through the market, and get out on the traffic line, in the traffic' " [R. 96, 97].

"When Thomas McKinney, Times district manager, assigned Roy Eley, a Times newsboy, to an off-spot at Fletcher and San Fernando, he was instructed by McKinney, among other things, 'to work until 11 o'clock.' Eley appeared daily at the Times concourse to report to McKinney before proceeding to his spot. Customarily McKinney and other Times district managers transport by automobile Times newsboys from the Times concourse where they report to sell newspapers to spots within their districts.

"Times district managers pay 12 newsboys a small sum each week for providing transportation for other newsboys and the Times makes an allowance to the district manager to cover this expense" [R. 99, 100].

3. "Likewise Roy Eley, a Times newsboy, was transferred from a location in Glendale, California, to another spot by Times' district manager, Thomas McKinney, to enable McKinney to assign to the Glendale spot another newsboy who operated an automobile and who could provide transportation for other Times newsboys traveling from the Times concourse to locations en route to Glendale" [R. 102].

Respondent's Comments on Eley's Testimony.

1. Reallocation of an order (viz., one delivery instead of two) occasioned by a change in press time in no manner supports the finding that the size of a news vendor's order is unilaterally determined by the district man. The maximum size of a newsboy's order will necessarily be restricted by the available supply and competing demands. Such matters are commonplace in our economy, and are vividly illustrated by existing conditions when the manufacturers and suppliers of many commodities are restricting quantities which they will deliver to any particular retail outlet. This restriction is no indication that the retailer is an employee of the manufacturer or retail jobber. Neither Eley nor any Times newsboy testified that the size of his order had ever been unilaterally determined or otherwise controlled by a district man. Eley explained that when the press time was changed from five to six o'clock in order to have complete racing results in the first edition,

> "* * * naturally the order was increased to cover the amount of papers that he had gave me formerly on two deliveries" [R. 1196].

Eley testified that he did not recall ever requesting more papers than were offered him [R. 1196]. He made apparent the reason for this when he said that if he sold out early he would go across the street and get additional copies from another newsboy and that he had never been without papers [R. 1203].

A Times district man (Max Dyer) who serviced a different territory from that in which Eley sold, testified without contradiction that the news vendors tell him how many copies they want and that he gives them the num-

ber requested and never requires them to take more [R. 1289].

2. This excerpt refers to a conversation occurring the first night that Eley sold the Los Angeles Times. Eley admitted he was wholly unfamiliar with his selling location and had to inquire where the location was and how he could get there [R. 1182-1184]. When one undertakes for the first time the sale of a product in a strange location, suggestions by the producer or manufacturer concerning places where sales can best be made and the names of prospective purchasers are not directions as to the manner and means in which the vendor (newsboy here) shall perform selling activities, but more correctly are suggestions calculated to assist in the attainment of a desired result, namely, a greater or increased sale of merchandise. This evidence, referring to one newsboy on his first night of street sales, we believe entirely insufficient to warrant its characterization as evidence of the exercise of such complete control as is necessary to establish the relation of employer and employee.

Eley admitted that after the first night the district man had not given him any directions concerning where he was to sell [R. 1185]. He testified that he exercised his own discretion as to the details of his selling activities. Concerning his sale at a drive-in market, he testified:

> "I would make, oh, as many trips as I deemed desirable through the market, and out on the white line in traffic * * *. I generally used my own judgment on that in this respect. The customers for the market are driving in there constantly to make purchases, and I would try to gauge that so that I could catch a complete change of prospective customers at each time" [R. 1197].

Respecting his sales at a traffic spot, he testified:

"Q. When did you hustle in that spot? A. Well, ordinarily, the traffic is heavy there from the time we first started up until, say, around 9:00 o'clock or 9:30, and at that time, why, I would expend more energies in the traffic line than I would later.

Q. When the customers were there? A. Naturally" [R. 1199].

3. The evidence upon which this finding rests appears at pages 1207-1208 of the transcript of record. On the Times' motion, the testimony was stricken by the Trial Examiner [R. 1208]. The Board affirmed the ruling of the Trial Examiner [R. 80].

John Roberts.

1. "When Frank Curtis, Times' district manager, transferred newsboy Roberts from his original place to a spot across the street where a 'drive-in stand' was located, Roberts was instructed by Curtis '* * * to work traffic and cover this drive-in stand * * * You have got to watch them cars in there every ten or fifteen minutes and make the stands and work your traffic as much as possible * * * Now, it's all right to go in this stand and go in the bar there and flash your papers, but do not blast your headline or anything like that * * * The management objects to that but * * * hold your paper up and give the customers a chance to see the paper. Don't cause any disturbance * * * Go right back to your safety zone'" [R. 97].

2. "Shortly prior to Christmas, 1938, Frank Curtis, Times district manager, removed permanently John A. Roberts, a Times newsboy, from his spot when Curtis decided that Roberts disposed of an insufficient number of newspapers to warrant his re-

tention. According to Roberts, Curtis stated: 'Roberts, I can't use you any more; I am going to have to put somebody on there that will hustle that spot. I have got so many papers to sell and I have got to put somebody on there that will work it better than you are.' Curtis was not a witness" [R. 102].

3. "Times district manager Curtis reprimanded newsboy Roberts because he stopped trying to sell papers during a rainfall, and as we noted above, Curtis discharged Roberts the next day for not hustling" [R. 106].

Respondent's Comments on Roberts' Testimony.

1. The Board failed to observe that Roberts requested the district man to transfer him from another location to the drive-in stand, declaring that it was a better selling site [R. 1218].

2. The explanation of Curtis for refusing to further transact business with Roberts does not support the Board's finding that "Curtis discharged Roberts" [R. 106].[3]

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[3]In the Houston Chronicle case several newsboys testified they had been "fired" by the circulation manager. In commenting on this testimony the Board said:

"* * * it appears that in fact all that had happened is that their papers were given to other newsboys when they had gotten into trouble and been unable to sell them."

28 N. L. R. B. 1043, 1046.

In holding home piece-workers independent contractors under the Social Security Act, it has been said:

"Although the plaintiff has the right not to employ the worker for another piece of work, yet no right exists by which the plaintiff can discharge the worker while the particular contract under which the worker is working is uncompleted."

Kentucky Cottage Industries v. Glenn, 39 F. Supp. 642 (D. C. Ky.).

3. The controversy between the Times district manager Curtis and the newsboy Roberts is disclosed by the testimony of Roberts appearing at page 1222 of the record. It indicates a difference of opinion between these two men respecting the ability or not to sell newspapers at the point in controversy under conditions then existing. There were no orders or directions given and none accepted. There was a termination of the business relationship on the following day, as explained in the immediately preceding comment.

John F. Fields.

1. "John F. Fields, Times newsboy, testified that at the time he 'first started' he was instructed by Bill Moore, Times district manager, to report at the Times concourse at 4:30 daily (except Saturday and Sunday), 2:00 o'clock on Saturday, and 3:00 o'clock on Sunday, and to 'check in' when Moore appeared at approximately 1:00 a. m. Bill Moore was not a witness" [R. 99].

2. "Bill Moore, Times district manager, directed Philip Tellis and John F. Fields not to sell the Examiner" [R. 107].

Respondent's Comments on Fields' Testimony.

1. This instruction as to time and place of issue and delivery of daily and Sunday editions and to time of payment for papers supplied when the newsboy for the first time commences his business transactions with the Times would appear to be the normal procedure, and standing alone the circumstance is consistent with either an independent contractor or an employee status. The Ford Company and General Motors prior to the war had for

years advised their agencies throughout the country, months in advance, time and place of delivery and selling price of new model cars.

2. Fields testified that when he began selling the Times he was told "That there would be an Examiner man working with me on the corner, and that I was to entirely ignore the Examiner altogether. In other words, if the people want an Examiner, don't make any effort to get it. 'You work for the Times'" [R. 1251]. He later testified that for a year and a half preceding the hearing he had been selling, in addition to the Times, the Examiner, the Evening Herald and Express, and a number of weekly and monthly periodicals [R. 1260-1269].

Philip Tellis.

1. "Bill Moore, Times district manager, directed Philip Tellis and John F. Fields not to sell the Examiner" [R. 107].

Respondent's Comments on Tellis' Testimony.

1. Tellis declared he paid no attention to the suggestion that he was supposed to work as an independent merchant, that he considered himself an independent merchant, and bought and sold his papers [R. 1247].

Edward Patch.

1. "Prior to the fall of 1935, the Times paid Edward Patch, a Times newsboy, a weekly bonus, which he received in the form of a Times check in addition to the differential retained by newsboys. Since the fall of 1935 when the Times discontinued the bonus payments, there has been no substantial change in

the Times' mode of operation in the circulation of its newspaper with respect to Patch" [R. 92, Note 21].[4]

Respondent's Comments on Patch's Testimony.

Whatever the effect of the bonus, the condition ceased approximately five years prior to the hearing. The Board's finding that subsequently there was "no substantial change in the Times' mode of operation in the circulation of its newspaper with respect to Patch" is contrary to the evidence. When Patch received a bonus he paid a substantially higher price for the newspaper than he paid after the bonus was discontinued [R. 1319-1322]. After the discontinuance of the bonus, Patch worked different hours than before [R. 1314]. In the absence of the bonus, there is no evidence to sustain the finding that Patch was an employee of the Times. Even the Trial Examiner declared: "I would get from the testimony an indication that the witness is not an employee at the present time" [R. 1328].

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[4]Upon conclusion of the testimony of Patch, counsel for the Times moved that the testimony be stricken. [R. 1327.] In response to the Trial Examiner's question, counsel for the Board and the Trial Examiner then engaged in the following colloquy:

> Mr. Mouritsen: "I think that I would oppose the granting of the motion, Mr. Examiner. I think that it has bearing upon that relationship as it exists at the present time."
>
> Trial Examiner Kennedy: "Well, I am going to deny the motion, but I want to observe that I would get from the testimony an indication that the witness is not an employee at the present time * * * So I think that any evidence that came in under that testimony would tend to establish the company's case rather than the union's case * * * I think it is prejudicial to the union's case. That is what I think." [R. 1327, 1328.]

Respondent's Closing Comment on Testimony of the Five Witnesses.

In each instance these excerpts from the testimony of the 5 newsboys refer to an isolated circumstance. There is no evidence that they are typical of a general practice or of an established custom. They relate to the experience of 5 out of 457 men involved, and not to a general practice or custom even as to these 5, but to isolated events in the experience of each without any intimation of like experience among the other 4. The evidence does not, we believe, establish the status of employer and employee with reference to these 5—certainly it has no evidentiary effect one way or the other with reference to the status of the other 452 men involved.

References by the Board to General or Uniform Practices or Customs (as Distinguished From Isolated Circumstances) Upon Which It May be Contended the Board's Finding Is Predicated.

In addition to the specific instances or isolated circumstances referring to Times newsboys in the subsection previously considered, the Board cited evidence (still relying upon the testimony of the same five Times newsboys) of other circumstances which it may be contended constitute evidence of a general practice or custom. We consider these references.

1. CHECKMEN.

The foundation stone of the Board's finding appears to be the operation of the checkmen [R. 90, 91].

The Times did not employ checkmen [R. 90, Note 18].

2. News Racks and Stands.

The Board found "The companies furnish boxes, racks, change aprons and placards advertising special features contained in the newspaper bearing the name of the publisher" [R. 97-98].

We believe there is no evidence in the record relating to boxes with which the Times was in any manner connected. The uncontradicted testimony of Julius J. Cohen, superintendent of street sales for the Times, is that news racks were obtained originally to service news dealers, that is drug stores, cigar stores and news stands; that occasionally the news racks need repair and are brought to the Times Building for this purpose and newsboys ask for them. They are not required to use them [R. 1171-1172]. The so-called instruction issued in isolated instances to three Times news vendors, viz., Eley, Roberts and Fields, to place newspapers in the racks, was a suggested aid to advertise the paper, thereby enabling the vendor to increase his sales and the publisher to obtain representation for his product.[5]

The news racks were on the street corners when these three newsboys first started selling the Los Angeles Times [R. 1190, 1217, 1252]. Manufacturers are desirous that their product be kept prominently in the public mind. Every drug store and department store contains numer-

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[5]In the *Matter of Federal Ice & Cold Storage Co.*, 18 N. L. R. B. 161, 165, in holding that the circumstance that an ice company painted its name on trucks operated by drivers did not establish the drivers as employees, it was said: "These services amount to no more than aid furnished by a distributor to independent dealers."

ous placards furnished by the manufacturers to the retailer with "instructions" to display them prominently.[6]

The Times newsboy Fields was supplied with a news rack by someone other than the Times [R. 1262].

The evidence is undisputed that there is no requirement that news vendors use change aprons. Some use them, others do not, it is entirely optional with the vendor. Some cut the word "Times" from the apron and retain merely the change pockets. [R. 1173-1174].

3. Requirement That Newsboy Be at His Post at Certain Time.

The Board found:

> "Generally the newsboy is required to be at his post from the time the newspapers customarily appear on the street to the time settlement is made" [R. 98].

The instances relied upon by the Board relating to the Times are again the newsboys Fields and Eley [R. 99]. And in each instance the testimony relates to the first night the newsboys commenced selling the Los Angeles Times. At the time of the hearing there were a minimum of three night and two morning street editions of the Times [R. 1156-1157; 1281]. Whether the news vendor be an independent contractor or an employee, the publisher of the paper is vitally interested in having him

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[6] "Manufacturers of nationally advertised products frequently impose many conditions on the merchants who sell such products. They also are cooperative with the merchant and aid in every way possible the sales of their merchandise." *Indian Refining Co. v. Dallman*, 31 F. Supp. 458; aff'd 119 F. (2d) 417.

at the point of sale and distribution immediately the several editions appear upon the street. The Times newsboy, Fields, declared that since he has a regular downtown location (February, 1939) [R. 1257] due to other work in which he is engaged, he has been late in arriving at his selling location [R. 1340]. The testimony of Eley relates to his individual experience the first night he began selling the Times [R. 1184].

4. Issuance of Extras.

The Board found that the publishers, through their district managers, notified the newsboys in advance of the issuance of an extra and that the newsboys are expected to attend their locations either before or after the usual selling period [R. 98, footnote 24]. There is no evidence in the record to sustain this finding as to the Times. The Board refers to none.

5. Removal and Transfer of Newsboys From One Location to Another.

The Board found "The record is replete with instances in which district managers have removed, permanently or temporarily, newsboys from their corners or transferred them from one location to another, for various reasons" [R. 100].

The Board relies upon the testimony of the Times newsboys, Eley and Roberts.

Respecting Eley, the Board declares:

> "Roy Eley, a Times newsboy, was transferred from a location in Glendale, California, to another spot by Times' district manager, Thomas McKinney, to enable McKinney to assign to the Glendale spot

another newsboy who operated an automobile and who could provide transportation for other Times newsboys traveling from the Times concourse to locations en route to Glendale" [R. 102].

The evidence upon which this finding rests appears at pages 1207-1208 of the record. Upon the Times' motion, the testimony was stricken by the Trial Examiner [R. 1208]. The Board affirmed the ruling of the Trial Examiner [R. 80].

Respecting Roberts, the Board declares:

"* * * Frank Curtis, Times District Manager, removed permanently John A. Roberts, a Times newsboy, from his spot when Curtis decided that Roberts disposed of an insufficient number of newspapers to warrant his retention" [R. 102].

The evidence on the subject is the testimony of Roberts that Curtis stated:

"'Roberts, I can't use you anymore; I am going to have to put somebody on there that will hustle that spot. I have got so many papers to sell and I have got to put somebody on there that will work it better than you are'" [R. 1223].

6. Company Supervision Over the Conduct of Newsboys While They Are Engaged in Street Sales.

The Board found:

"The record also contains evidence with respect to the extent of the Companies' supervision over the conduct of the newsboys while they are engaged in selling newspapers on the street" [R. 103].

No instance of supervision by the Times is cited in the Board's opinion, and we think none may be found in the transcript of record, unless it is concluded that the testimony of removal and transfer of Ely and Roberts (just considered) and the argument between Curtis and Roberts respecting the ability or not to sell papers on the street during rainy periods [R. 1222] are indicative of supervision.

7. Sale of Other Newspapers and Magazines.

The Board found:

> "As a general practice, the newsboys sell more than one newspaper and handle magazines. In certain instances, however, the Companies have objected to the newsboys' handling competing publications * * *. Bill Moore, Times district manger, directed Phillip Tellis and John F. Fields not to sell the Examiner" [R. 106-107].

The testimony of Tellis reads:

> "Q. Now, what did Mr. Moore say to you and what did you say to Mr. Moore? A. Mr. Moore told me that he was building up that spot and that he did not want me to handle the Examiner. It was strictly a Times corner.
>
> Q. In that conversation did he say anything respecting any other publication? A. Not—not at the time, no.
>
> Q. Was that about all of the conversation that you recall? A. Practically all.
>
> Q. And did you act in accordance with what he said to you in that conversation? A. Well, no" [R. 1244].

Tellis also testified:

> "Q. Did you get any salary from the Times? A. No salary. I was supposed to work as an independent merchant. I always considered myself as an independent merchant. Bought my papers and sold." [R. 1247].

Fields testified that for the year and a half preceding the hearing he had been selling the Los Angeles Times, The People's World, Ham and Eggs, Socialist Call, Jewish Forward, The Voice, Wall Street Journal, Evening News, Los Angeles Examiner, Evening Herald and Express, Saturday Evening Post, Look, Collier's and Liberty [R. 1260-1269].

8. Place of Sale; Manner of Display; Discharge and Transfer of Newsboys.

In conclusion the Board found that the Companies

> "supervise the newsboys' selling activities as to such details of performance as the manner of calling, holding, and displaying the newspaper, and place of its sale within the allotted territory. Furthermore, the Companies at will discharge the newsboys, transfer them to other locations, and lay them off as disciplinary measures. * * * Since the relationship contemplates services of an indefinite duration terminable at the will of either party, the newsboy has no vested interest in the newspaper business" [R. 109-110].

There is no evidence that the Times supervised any of the selling activities with respect to "the manner of calling, holding and displaying the newspaper.". The Times restricts the place of sale in the sense that a certain "spot"

or selling location is allotted in the same fashion that a selling territory is allotted to the sales representative of any distributor. That the Times will not continue doing business with the newsboy if he is not successful in making sales does not indicate his status to be an employee. It was so held in *New York Indemnity Co. v. Industrial Accident Commission*, 213 Cal. 43, 1 Pac. (2d) 12.[7] The relationship between the Times and newsboys is not of indefinite duration, as stated by the Board in its finding. The relationship, though brief, is definite; that is, from night to night, or morning to morning, as the selling period may be. Each day the contractual relation is renewed.[8] There is no evidence that the relationship was

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[7] *New York Indemnity Co. v. Industrial Accident Commission*, *supra*, at p. 49.

The Supreme Court of California, in holding that street vendors of two Los Angeles papers were not employees of either newspaper, declared:

> "* * * we are constrained to hold that the limited amount of control which the publishers of these two newspapers undertook to exercise over the newsboys, * * * who daily purchased from their district manager a specified number of copies of their daily issues for a specific sum, payable in cash or at the close of each day's sales, and who undertook the retailing of the same to such customers among the public at large as they were able to attract or procure at specified place and price fixed by the publishers, would not *as a matter* of law be sufficient to constitute such newsboys the employees of the publishers * * *."
>
> 213 Cal. 49; 1 P. (2d) 15.

[8] In holding home piece-workers independent contractors under the Social Security Act, it has been said:

> "Although the plaintiff has the right not to employ the worker for another piece of work, yet no right exists by which the plaintiff can discharge the worker while the particular contract under which the worker is working is uncompleted."
>
> *Kentucky Cottage Industries v. Glenn*, 39 F. Supp. 642 (D. C. Ky.);
>
> *New York Indemnity Co. v. Industrial Accident Commission*, 213 Cal. 43, at 47.

ever terminated during the course of a selling period. The relationship is such that it may not be so terminated. After the Times has sold the newsboy a bundle of papers, the newsboy sells them for cash or on credit, allows them to be destroyed or stolen as he wishes. The Times may refuse to sell him the next day or not as it concludes. It is a day to day contractual relationship.

In the *Houston Chronicle* case, several newsboys testified they had been "fired" by the circulation manager. In commenting on this testimony the Board said:

> "* * * it appears that in fact all that had happened is that their papers were given to other newsboys when they had gotten into trouble and been unable to sell them."
>
> *Matter of Houston Chronicle Publishing Co. v. N. L. R. B.*, 28 N. L. R. B. 1043, 1046.

PART IV OF POINT ONE—

THE RECORD DISCLOSES WITHOUT CONFLICT EVIDENCE OF A SERIES OF GENERAL AND UNIFORM PRACTICES USUALLY AND CUSTOMARILY OCCURRING IN THE TRANSACTION OF THE TIMES AND THE ENTIRE 457 NEWSBOYS ENGAGED IN THE STREET SALE OF THE TIMES, WHICH DEFINITELY ESTABLISH A STATUS INCONSISTENT WITH THAT OF EMPLOYER AND EMPLOYEE.[9]

For the purpose of contrasting the Board's consideration of specific instances or isolated circumstances respecting 5 of the 457 newsboys involved, we now enumerate a series of general and uniform practices customarily attendant upon the business transaction of the Times and the entire 457 newsboys involved. They are:

1. The newsboys are not carried on the Times' payroll [R. 1343].

2. The newsboys receive no money or other thing of value from the Times for selling its newspapers [R. 1294].

3. The newsboys are not registered as employees with the Social Security Board [R. 1344].

4. The newsboys are not covered by Workmen's Compensation Insurance carried by the Los Angeles Times on its employees [R. 1344].

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[9]The Board so held in the *Houston Chronicle Case*, 28 N.L.R.B. 1043, 1046.

5. The newsboys are not employees within the meaning of the term as used in the California Workmen's Compensation Insurance & Safety Act.[10]

6. The Times kept no list of the names of the newsboys selling the Los Angeles Times or the locations where the newsboys make such sales [R. 1149, 1153-1154, 1295-1296].

7. The newsboys take the risk of lost, destroyed or stolen papers or papers sold by them on credit [R. 1194-1195].

8. The newsboys may and as a general practice do sell other local competing newspapers and magazines and periodicals [R. 106—Board Finding].

9. The newsboys purchase the papers from the Times at uniform prices and resell them to their customers at uniform prices, the difference in the purchase and selling price representing the entire profit of the newsboy on the transaction [R. 1195, 1169-1170].

10. Each newsboy is restricted in his operations to a limited area, viz., an "established spot."[11]

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[10]*New York Indemnity Co. v. Industrial Accident Commission*, 213 Cal. 43; *State Compensation Insurance Fund v. Industrial Accident Commission*, 216 Cal. 351.

[11]The Board's Decision and Direction of Election ordered an election among "all newsboys engaged in the street sale of the Times at established spots * * * within Los Angeles and Glendale * * *" [R. 112].

An "established spot" is "a place where a newsboy has engaged in the street sale of the Times, * * * 5 or more days a week for a period of 6 consecutive months or more * * *" [R. 113, 114].

In *Matter of Federal Ice & Cold Storage Co.*, 18 N.L.R.B. 161, 164, drivers of ice trucks were restricted to operating in specified areas. In declaring that the drivers were not employees, the Board said this is a "restriction * * * commonly placed on independent dealers by distributors * * *."

POINT TWO.

There Is No Substantial Evidence to Support the Finding of the Board That the Unit Found by It to Be Appropriate for Collective Bargaining Purposes Is an Appropriate Unit.

DESIGNATION OF UNIT.

The Board found the appropriate unit to be "* * * all newsboys engaged in the street sale of the Times at established spots 4 or more hours a day, 5 or more days a week, within Los Angeles and Glendale, California, except temporary newsboys; * * *" [R. 115, 341].

UNFAIR LABOR PRACTICE INVOLVED.

The Times was charged with, and found guilty of, unfair labor practices, viz., violations of section 8, subsections (1) and (5) of the Act, in that it refused to bargain collectively with the Newsboys' Union "as the exclusive bargaining representative of its employees who are newsboys engaged in the street sale of the Times at established spots 4 or more hours a day, 5 or more days a week, within Los Angeles and Glendale, California, except temporary newsboys" [R. 349].

The National Labor Relations Act provides [49 Stat. 449 *et seq.*]:

Section 8 [29 U. S. C. A. 158]:

> "It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in * * * this title.
>
> * * * * * * * * *
>
> (5) To refuse to bargain collectively with the representatives of his employees, * * *"

THE APPROPRIATE UNIT FINDING MUST BE SUPPORTED BY SUBSTANTIAL EVIDENCE.

Unless there is substantial evidence to support the Board's finding of the appropriate unit, the complaint fails. This court has declared:

> "To reach a conclusion upon the complaint under consideration against the company of unfair labor practices * * *, *the validity of the Board's decision as to the appropriate unit must be decided.* As the unfair practice charged was the refusal to bargain collectively because of the inclusion of the Crystal City employees in the unit, if they were improperly included, the complaint fails."
>
> *Pittsburgh Plate Glass Co. v. N. L. R. B.*, 313 U. S. 146, 152.

Under Sections 9(a) and (b) of the Act [29 U. S. C. A. 159] it is provided:

> "(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining * * *."
>
> "(b) The Board shall decide in each case whether, * * * the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

The decision of the Board respecting the appropriate unit may not be an arbitrary or capricious one, but should be manifestly rational.

N. L. R. B. v. Sunshine Mining Co. [C. C. A. 9], 110 F. (2d) 780, 789 (certiorari denied 312 U. S. 678);

Pittsburgh Plate Glass Co. v. N. L. R. B., 313 U. S. 146, 165, 172.

THE REQUIREMENT OF DUE PROCESS IS MET BY THE ACT ONLY BECAUSE THE REVIEWING COURTS HAVE THE POWER, RIGHT AND DUTY TO PROTECT AGAINST ARBITRARY ACTION BY THE BOARD.

N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 46-47:

> "The procedural provisions of the Act are assailed. But these provisions, as we construe them, do not offend against the constitutional requirements governing the creation and action of administrative bodies. See Interstate Commerce Comm'n. v. Louisville & Nashville R. Co., 227 U. S. 88, 91. The Act establishes standards to which the Board must conform. There must be complaint, notice and hearing. The Board must receive evidence and make findings. The findings as to the facts are to be conclusive, but only if supported by evidence. The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority, are open to examination by the Court. We construe the procedural provisions

as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well-settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation."

Quoted with approval,

Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 49.

SEVERAL GROUPS OF TIMES NEWSBOYS WERE EXCLUDED ARBITRARILY FROM THE BARGAINING UNIT.

In determining the appropriate unit, the Board arbitrarily excluded several groups of Los Angeles Times street vendors. The groups so excluded are

1. All vendors engaged in the street sale of the Times in any city within the metropolitan area outside Los Angeles and Glendale;
2. All vendors engaged in the street sale of the Times at any place within Los Angeles and Glendale other than at established spots;
3. All vendors engaged in the street sale of the Times within Los Angeles and Glendale at established spots for 5 or more days a week, but for less than 4 hours a day;
4. All vendors engaged in the street sale of the Times within Los Angeles and Glendale at established spots for more than 4 hours a day, but for less than 5 days a week;
5. All vendors engaged in the street sale of the Times either within or without Los Angeles and/or Glendale, who are classified as temporary vendors.

These exclusions are not rational. Each is an arbitrary or capricious one. No one is based upon any rational difference in the status of those excluded from those included. No one is based upon any showing that the terms or conditions of sale of the Los Angeles Times to the news vendors included in the unit differed in manner or degree from those of the vendors excluded.

THE METROPOLITAN AREA IS ARBITRARILY DIVIDED INTO CITIES INCLUDED AND CITIES EXCLUDED.

The Los Angeles metropolitan area is clearly portrayed on a map marked "Times' Exhibit B" [R. 186A]. The evidence is without dispute that Times vendors selling the Los Angeles Times within the cities of Beverly Hills, Burbank, Belvedere, South Pasadena, Westwood, and Huntington Park have precisely the same relation with the Times as the street vendors of the Times in Los Angeles and Glendale [R. 1175-1176]. These five municipalities in which the Times news vendors are denied inclusion in the bargaining unit are in each instance contiguous to the territorial boundaries of the City of Los Angeles, and in each instance the territorial limits of the entire municipality excluded is closer to the location of the Los Angeles Times Building and the business district of the City of Los Angeles than large areas of the City of Los Angeles which are embraced within the unit. The Times Exhibit B [R. 186A] discloses that the City of Beverly Hills is entirely surrounded by territory within the City of Los Angeles, and likewise discloses that the Cities of Burbank and South Pasadena have precisely the same territorial relation to the City of Los Angeles as does the City of Glendale. The reason for the arbitrary exclusion of

Los Angeles Times street vendors from the cities above enumerated and the inclusion of such vendors in the City of Glendale is disclosed by the record. We quote from the Board's decision and direction of elections:

"VI. The appropriate units.

* * * * * * * * *

"Although the Companies circulate and distribute their newspapers in suburban areas outside Los Angeles, the Union has organized only the newsboys who sell newspapers within Los Angeles, except in the case of the Times. In addition to the newsboys selling the Times within Los Angeles, the Union has organized the newsboys selling the Times in Glendale, California, a suburb of Los Angeles. *All newsboys engaged in the selling of newspapers in the metropolitan area* of Los Angeles *are eligible to membership in the Union.*

Each of the companies contends that the unit sought by the Union in its respective case is inappropriate because newsboys, having interests similar to those whom the union seeks to represent as exclusive bargaining representative, are excluded.

* * * * * * * * *

Similarly, the Union does not desire to include in the unit the suburban newsboys, other than the Times newsboys in Glendale, California, because *organization has not as yet been extended* to the suburban group generally. Since those whom the Union desires to be included in the unit are, in general, mature individuals who daily rely upon their earnings from the street vending of newspapers as their source of support, since the Union is the only labor organization existing among the newsboys, and *because Union organization has not at present extended* to suburban

newsboys *other than Times newsboys in Glendale*, California, we find the following units, as requested by the Union, to be appropriate for the purposes of collective bargaining:

"(a) * * * * * * * * * *

"(b) * * * * * * * * * *

"(c) All newsboys engaged in the street sale of the Times at established spots 4 or more hours a day, 5 or more days a week, within Los Angeles and Glendale, California, except temporary newsboys; and

"(d) * * * * * * * * * *" [R. 112-115].

Here is the clear pronouncement by the Board that the exclusion of the Times news vendors in cities outside Los Angeles, other than Glendale, is based upon the circumstance that union organization of the Times newsboys has not been extended to such cities.

THE PURPOSE OF THE ACT IS THE PROTECTION OF ALL EMPLOYEES, REGARDLESS OF WHETHER UNIONIZED OR NOT.

Valley Mould & Iron Corp. v. N. L. R. B. [C. C. A. 7], 116 F. (2d) 760, 764 (certiorari denied 313 U. S. 590):

"The act was intended to secure and preserve for employees the right to bargain collectively without intimidation, coercion or other improper influence from anybody, whether it be employer, labor unions or others."

National Labor Relations Board v. National Casket Co. [C. C. A. 2], 107 F. (2d) 992, 997:

"The purpose of the Act is not to compel an employer to hire members of one union rather than another, or union men rather than non-union men."

National Labor Relations Board v. Indiana & Michigan Electric Co., 318 U. S. 9, 19:

> "Their (the organizers') proposition to the Company that it cause the men to join Local B-9 was a proposal to violate the National Labor Relations Act, whose purpose is to protect the workmen from employer pressure and leave them free to choose for themselves whether, and with whom, they will associate."

This court, in considering adequate standards to guide the Board's decision, declared:

> "While the exact limits of the Board's powers or the precise meaning of the terms have not been fully defined, judicially, we know that they lie within the area covered by the words 'employer,' 'plant,' and 'craft' * * * As a standard, the Board must comply, also, with the requirement that the unit selected must be one to effectuate the policy of the act, the policy of efficient collective bargaining. Where the policy of an act is so definitely and elaborately stated, this requirement acts as a permitted measure of delegated authority."[12]

The Newsboys' Union did not seek a craft unit or an industrial unit, or any unit with a history of collective bargaining. It sought and obtained the designation of itself as the representative of a limited group of Times' street vendors excluding other groups operating under

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[12] *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U. S. 146, 165-166.

the same conditions, on the sole ground that the union's organization activities had not extended to the groups excluded.

EXCLUSION WITHIN THE CITY OF LOS ANGELES OF SO-CALLED TEMPORARY NEWSBOYS OR NEWSBOYS SELLING AT STREET CORNERS NOT CLASSIFIED AS ESTABLISHED SPOTS.

There is no evidence upon which these distinctions in street vendors are made. Why a Times street vendor who had not been selling the Times for more than 30 days should be excluded, the record does not disclose. It was upon the testimony of Times *temporary* news vendors relating their experiences of their first night of sale at an *"off-spot"* that the Board's findings against the Times are to some extent predicated.[13] There is no manifestly rational justification in the record for excluding Times vendors who sold at "off-spots" but not at "established spots." If there is justification in the decision and direction of elections, it is found in this language:

> "The union desires to exclude bootjackers, temporary, and part-time newsboys, since they consist largely of school boys who do not depend upon the vending of newspapers for a livelihood, and because of the irregularity of their employment" [R. 114-115].

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[13]Roy Eley [R. 1182-1184], John F. Fields [R. 99].

There is no evidence in the record indicating that newsboys selling the Los Angeles Times are school boys, or that any of the newsboys are immature or do not depend upon the selling of newspapers for their livelihood. The finding of the Board as to the appropriate units of various papers appears to concede that bootjackers, temporary, casual, and part-time newsboys relate to the News and Herald and not to the Times.[14] The evidence at least is all to this effect [R. 857-865].

During the certification hearing an attempt was made to justify the exclusion of temporary newsboys and to justify the use of the term "established spot". This attempt failed dismally. The record discloses conclusively that the use of the term "temporary newsboys" and the term "established spots" was pure guesswork and speculation. The Examiner on motion struck the evidence from the record [R. 1576-1583]. The Times circulation manager later testified that in the Cities of Los Angeles and Glendale the Los Angeles Times was sold by temporary and permanent newsboys at established spots and elsewhere and that he was unable to estimate the respective percentages so sold. [R. 1598.]

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[14]The designation of units reads:

"(a) All full-time newsboys and checkmen who are engaged to sell the News within Los Angeles, California, excluding bootjackers, temporary, casual, and part-time newsboys; (b) All full-time newsboys and checkmen who are engaged to sell the Herald within Los Angeles, California, excluding bootjackers, temporary, casual, and part-time newsboys; (c) All newsboys engaged in the street sale of the Times, at established spots, 4 or more hours a day, 5 or more days a week, within Los Angeles and Glendale, California, except temporary newsboys; * * *" [R. 115, 341].

THE ARBITRARY DETERMINATION OF THE UNIT OPERATES TO THE SUBSTANTIAL PREJUDICE OF THE TIMES.

Such arbitrary definition of an appropriate unit will mean that the Times will never know from one day to another which individuals are within and which without the group represented by the Newsboys Union. Reference to the color map [R. 186-A] wil make apparent that negotiations by the Times with the Newsboys Union as the bargaining representative of news vendors in Los Angeles and Glendale only, will either foment discontent and suspicion in the minds of those vendors selling elsewhere or bring about demands by them or other bargaining groups on their behalf. Possibly as each city is organized, application to the Board for certification of representatives will be made. If several groups are designated as bargaining representatives of the newsboys in the nearby cities where the Los Angeles Times is sold, the Times will be obliged to bargain with many units instead of one. The units will be competing one against the other and perhaps even seeking to augment membership at the expense of a rival unit. Rather than tending to create industrial peace and harmony, the Board's decision tends to create the opposite result. It readily may be foretold that discontent and strife rather than harmonious industrial relations will be engendered if this arbitrary and capricious unit is finally determined to be an appropriate one to represent newsboys engaged in the street sale of Los Angeles Times. In accepting the Union's desire that newsboys operating in union organized areas be included and newsboys operating in areas not yet union organized be excluded, the Board ignored factors it ordinarily considers in determining the appropriateness of a unit.[15]

[15] *Pittsburgh Plate Glass Co. v. N. L. R. B.*, 313 U. S. 146, 153

POINT THREE.

It Is Within the Power of the Court to Examine the Record for the Purpose of Determining Whether There Is Substantial Evidence to Sustain the Board's Finding That Newsboys Engaged in Street Sales of the Los Angeles Times Are Its Employees and That the Unit Appropriate for Collective Bargaining Purposes Consists of Those Newsboys Defined in the Board's Decision and Direction of Elections.

INTERPRETATION OF STATUTES AS APPLIED TO JUSTICIABLE CONTROVERSIES IS A JUDICIAL FUNCTION.

U. S. v. American Trucking Associations, 310 U. S. 534, 544:

"The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function."

THE BOARD'S FINDINGS ARE CONCLUSIVE ONLY WHEN SUPPORTED BY SUBSTANTIAL EVIDENCE.

N. L. R. B. v. Columbian Enameling and Stamping Co., 306 U. S. 292, 299;

N. L. R. B. v. Southern Bell Tel. and Tel. Co., 319 U. S. 50, 51.

"On this certiorari the question is whether the order of the Board herein is supported by substantial evidence."

There is nothing to the contrary in the line of authorities relied upon by petitioner, viz.:

1. *Gray v. Powell,* 314 U. S. 402;
2. *Sunshine Anthracite Coal Co. v. Adkins,* 310 U. S. 381;
3. *South Chicago Coal and Dock Co. v. Bassett,* 309 U. S. 251;
4. *Rochester Tel. Corp. v. United States,* 307 U. S. 125;
5. *Shields v. Utah Idaho Central R. Co.,* 305 U. S. 177.

Gray v. Powell, supra, the latest decision, is typical. In that case the Bituminous Coal Act of 1937 (15 U. S. C. A., Secs. 828 *et seq.*) was under consideration. Section 4-A of the Act set up machinery for obtaining exemptions. An application by the receivers of a railway company for exemption was denied. Following review of the order and reversal by the Circuit Court of Appeals (*Powell v. Gray,* 114 F. (2d) 752) this court granted certiorari (311 U. S. 644). The judgment of the Circuit Court of Appeals was reversed.

This court, after quoting section 4-A, declared:

> "In a matter left specifically by Congress to the determination of an administrative body, as the question of exemption was here by Sections 4-II(1) and 4-A, the function of review placed upon the courts by Section 6(b) is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and an application of the statute in a just and reasoned manner. * * *

"Such a determination as is here involved belongs to the usual administrative routine. *Congress, which could have legislated specifically as to the individual exemptions from the code, found it more efficient to delegate that function* to those whose experience in a particular field gave promise of a better informed, more equitable, adjustment of the conflicting interests of price stabilization upon the one hand and producer consumption upon the other."

314 U. S. 411-412.

Continuing, the court said:

"Just as in the *Adkins* case (310 U. S. 381) the determination of the sweep of the term 'bituminous coal' was for this same administrative agency, so here there must be left to it, subject to the basic prerequisites of lawful adjudication, the determination of 'producer.'"

314 U. S. 412-413.

There is not in the National Labor Relations Act any comparable delegation of power such as appears in the Bituminous Coal Act of 1937. The Circuit Court of Appeals of the Ninth Circuit correctly disposed of the Board's contention in this particular when it announced:

"The rule that an administrative application of a general statute is conclusive unless arbitrary, *Gray v. Powell*, 314 U. S. 402, 411; *Sunshine Coal Co. v. Adkins*, 310 U. S. 381, 399; *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177, is not applicable to the situation under consideration. *Contrary to the cases cited, there is no delegation to an administrative body of power to determine whether the facts are within a specified exception to a statute*, the exercise of which

power involves an interpretation of terms. Rather does the instant case fall within the general rule that 'the interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function.' *United States v. American Trucking Ass'ns., Inc.*, 310 U. S. 534, 544." [R. 1848; 136 F. (2d) 612.]

An excerpt from recent decision of the Circuit Court of Appeals of the Fifth Circuit we believe is helpful.

> "It is within the province of the court to determine whether or not words spoken and actions taken amount, as a matter of law, to unfair labor practices under Section 8 of the Act. It is the province of the Board to determine whether words were spoken or acts were done. *However, the legal effect of the words spoken or acts done, and a determination of whether or not they amounted to a violation of the Act, may be a legal question and within the power of the court to determine.* It is also within the power of the court to determine whether or not there is a total lack of evidence on which any particular finding could be predicated."
>
> *Jacksonville Paper Co. v. National Labor Relations Board* (5 C. C. A.), 137 F. (2d) 148, at 150. (Certiorari denied October 18, 1943, 64 S. Ct. 84.)

Conclusion.

In the Board's Brief,[16] despite extended discussion and argument respecting the scope of the Act and the binding effect upon the courts of the Board's decision, it appears to be admitted that *unless the findings are supported by substantial evidence* they are not binding upon the courts. This is precisely what we have contended.[17] We quote the following excerpts from the Board's Brief:

> "The determination of the administrative body must have *'warrant in the record'* (*Rochester Telephone Corp. v. United States*, 307 U. S. 125, 146) and a reasonable basis in the law. Just as an administrative decision which is *unsupported by substantial evidence* has no rational basis in fact, so, too, an administrative ruling which is plainly unreasonable in the light of express statutory language or other convincing evidence of legislative intention has no foundation in law. For *either vice* administrative action may be set aside" [Board's Br. pp. 56 and 57].

> "The Board's determination of the existence of an employment relationship, if not arbitrary and *supported by the evidence*,[18] is conclusive" [Board's Br. p. 28].

> "Having shown that the Act does not merely echo a common law test of master and servant * * * we urge, first, that the question of coverage was for

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[16]The Board's Brief which we have before us is a 104 page document, received January 19, 1944. The covering letter explains that changes are anticipated before final printing and filing and that in the final document the pagination will differ from the copy presently in our hands. Of necessity we are compelled to refer to the copy now before us.

[17]*Ante* Point One, Part III, pages 22 *et seq.*

the determination of the Board * * *, and that the court below should have upheld the Board's determination since it was not arbitrary and *was supported by substantial evidence.* * * *" [Board's Br. pp. 50 and 51].

"In each of the cases cited, this Court recognized that the question as to whether particular facts brought a person within statutory language was a matter of judgment on which the decision of the administrative official was to be accepted, *if supported by evidence*[18] in the record, * * *" [Board's Br. p. 52].

"The Board's determination of the employment relationship will not be reviewed *de novo* by the courts, attempting to apply a 'fact'—'law' yardstick, but will be sustained if reasonable and *supported by the evidence*"[18] [Board's Br. pp. 95 and 96].

The court below decided that the findings of the Board are not supported by substantial evidence. The precise language of the opinion reads:

"The question for decision as to each newspaper separate from any other paper is *whether there is substantial evidence* * * * to support the Board's decision that they were employees under Section 2 (3) of the National Labor Relations Act" [R. 1849-1850].

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[18] "But as has often been pointed out, this, as in the case of other findings by administrative bodies, means evidence which is substantial * * *."

N. L. R. B. v. Columbian Enameling and Stamping Company, 306 U. S. 292, 299.

> "* * * we believe * * * that *there is no substantial evidence* herein to support the Board's determination that the newsboys are 'employees' of the publishers * * *" [R. 1850].
>
> "We think the Board is *not supported by substantial evidence* in its finding that the 'newsboys' are employees of the publisher whose newspaper they vend" [R. 1851].

The foregoing excerpts from the opinion persuasively indicate that the lower court did not indulge in a *"de novo* judicial review" of the record as the Board contends [Board's Br. pp. 2, 50, and 96].

The Board's Brief is given over largely to the contention that a proper interpretation of the terms "employer" and "employee" as they appear in the Act are not synonymous with the common law terms "master" and "servant." In fact the opening statement of Point One of the Board's Summary of Argument reads:

> "The common law of master and servant does not define the employment relationship under the Act. This court has recognized that the term 'employees' is not a word of art but varies in meaning from statute to statute depending upon the context in which it is used" [Board's Br. p. 27].

We have not contended that the common law definition of master and servant controls, nor that the term "employee" is a word of art. Neither contention may be found in any of our briefs. As stated heretofore [*ante* p. 10] throughout we have contended that "The term 'employee' was used by the Congress in the National Labor Relations Act in the ordinary and conventional legal sense

as interpreted under the common law and by decisions of federal courts defining the term as used in other cognate social legislation."

Before the Circuit Court of Appeals the Board stated its position as follows [*ante* p. 10]:

> "Contrary to petitioners' [respondent herein] contentions, common law texts and cases and statutory concepts borrowed from other legislation passed for another purpose are of no assistance in determining the scope of the statutory employment relationship."

Presently before this Court the Board states its position as follows:

> "The court below ignored the distinctive purpose and policy of the National Labor Relations Act and equated the definition of employment in Section 2 (3) of the Act solely with the common law of master and servant. We believe that not only the purpose and policy of the Act but also its plain language furnish the basis for a distinctive and broad definition of employment and that neither the common law nor definitions contained in other statutes limit the reach of the Act" [Board's Br. p. 34].

There is a further declaration in the Board's Brief to the effect that the lower court is imposing "upon the Board a strait-jacket concept of employment" [Board's Br. p. 68]. The authors of the Board's Brief are not unaware that their contentions in this respect are not borne out by the language of the lower court's opinion for in recognition of the position taken by the lower court counsel for the Board concede:

> "Although the court below *paid lip service* to the fact that it was dealing with legislation 'based upon

a broad policy of public benefit' [R. 1848], it selected from among conflicting formulations of the common law one which states the test most rigidly: 'the control referred to must be complete control of the means and methods of performance' [R. 1849]" [Board's Br. p. 89, note 5].

The language of the opinion of the Circuit Court of Appeals referred to reads:

"Since the term 'employee' is not defined in the Act, we agree with petitioners' contention that it must be given its conventional meaning as developed under the common law and statutory enactments.

* * * * * * * *

"The term 'employee' has been interpreted under several federal statutes, other than the National Labor Relations Act, in like manner based upon a broad policy of public benefit" [R. 1848].

"In determining status as between employee and independent contractor the basic inquiry is where the right to control lies, and the control referred to must be complete control of the means and methods of performance" [R. 1849].

For us it is not easy to understand the Board's position with reference to the definition of the term "employee." Before this court the Board takes the position

"that the application of this term is peculiarly *a matter of labor relations* rather than *a matter of statutory construction*" [Board's Br. p. 30].

"* * * its interpretation and application are matters of *labor relations* rather than of *statutory construction*" [Board's Br. p. 77].

Elsewhere in the Board's Brief are found these expressions:

> "* * * the broad test of coverage under the Act is, then, the collective bargaining concept" [Board's Br. p. 35].
>
> "The language of the Act not only embraces all those to whom the collective bargaining concept may appropriately be applied but fixes a standard of coverage which differs from the scope of the common law master and servant relationship" [Board's Br. p. 39].

To the same effect are statements appearing at pages 40, 62, and 64 of the Board's Brief. This further statement of the Board's position is encountered:

> "The whole body of administrative decisions of the Board which now fill 54 volumes is based on this *sui generis* concept of the employee relationship. This concept is one not generally familiar to the courts but well known to experts in labor relations. Confusion would result were the courts now to impose upon the Board a strait-jacket concept of employment" [Board's Br. p. 68].

We have heretofore in this brief, Point One, Part II, Subdivisions B, C, and D (*ante*, pp. 12-20), referred to acts of Congress (including among others the Social Security Act and the Fair Labor Standards Act) of a purpose like unto the National Labor Relations Act and to decisions of this court and of the several Circuit Courts of Appeals construing these acts, which decisions would indicate that the courts are not unfamiliar with the in-

terpretation to be placed upon the term "employee." It is a sad commentary on our federal courts to intimate, if not specifically declare, that they are not familiar generally with the concept of the term "employee" as it may appear in the numerous congressional acts that have come before them for consideration and interpretation.

Just how do counsel for the Board reconcile their foregoing statement with the prayer in the Board's Petition for Writ of Certiorari, reading as follows:

> "It is important both in the interpretation of the National Labor Relations Act and of such legislation as the Social Security Act and the Fair Labor Standards Act that the lower courts be advised whether 'employee' is to be interpreted in an enlightened manner which gives effect to the realities of economic relationships and the power of the employer or is to be given a narrow construction such as the court below applied in the case at bar" (Pet. for Cert., p. 25).

Recently in a National Labor Relations Board case[19] the Circuit Court of Appeals for the Second Circuit, although conceding that for practical purposes the decision of the Board is final upon those issues as to which it must be assumed to have the competence born of its special acquaintance with labor relations, such as the extent and persistence of an employer's influence upon a succeeding company union, nevertheless examined the record and concluded that the evidence failed to sustain the Board's find-

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[19] *National Labor Relations Board v. Dadourian Export Co.*, 138 F. (2d) 891.

ing that the employer unlawfully refused to bargain collectively with the union representative of the employees. In the course of its opinion the court declared:

> "We do not forget the latitude which we must accord to all the Board's findings. In National Labor Relations Board v. Standard Oil Company, 138 F. 2d 885, we have just decided that upon those issues as to which it must be assumed to have a competence, born of its specialized acquaintance with labor relations—such as the extent and persistence of an employer's influence upon a succeeding company union—it is for practical purposes supreme. If this is such an issue, it should be supreme here as well; but it seems to us that to say so *would reduce the review which the statute indubitably gives to courts to shadow and simulacrum.* It would be fantastic, we think, to say that only those versed in labor relations are competent to determine the meaning of such language as that we have quoted, because it was addressed to employees. As we have said, the Board might have refused to believe the witnesses at all, but if it did not, the issue involves a construction of the law: i. e., the scope of the right to choose representatives. Nothing in the books suggests that in the end the courts have not that responsibility."
>
> 138 F. (2d) 892-893.

Elsewhere in the Board's Brief [p. 69] we find this statement:

> "The versatile administrative connotations of and refinements in the term 'employee' which the Board has developed in connection with Section 9 emphasize the fact that this is a subject matter peculiarly appropriate to the exercise of administrative discretion."

Then follows a series of references to Board decisions. These references we think rather definitely indicate in most, if not all, instances that the conventional interpretation of the term "employee" is adopted by the Board. For illustration (now referring to the Board's Brief):

1. Whether those who work for a contractor are the employees of the primary employer and are to be grouped with other employees of the primary employer for bargaining purposes [Board's Br. p. 69];

2. Grouping in an appropriate bargaining unit employees of interrelated companies and of competing companies [Board's Br. p. 70];

3. Determining whether extra and irregular employees should be granted the same bargaining rights as full-time employees [Board's Br. pp. 71-72];

4. In deciding whether striking employees and employees replacing strikers are entitled to vote [Board's Br. p. 73];

5. In deciding that laid off employees have a sufficient expectancy of return to employment and that employees discriminatorily discharged are entitled to vote [Board's Br. pp. 73-74];

6. In determining status of temporary employees, relief employees, part-time employees, and intermittent and casual employees [Board's Br. p. 75].

The Board in each instance is dealing with employees in the sense in which we contend the term is used in the Act.

The Board's Brief gives no consideration to the appropriateness of the bargaining unit designated other than to say [p. 26, note 23] that the court failed to pass upon

the respondent's claim that "the unit found by the Board was inappropriate for collective bargaining purposes."

The Board's position, based upon its interpretation of the line of cases of which *Gray v. Powell*, 314 U. S. 403, is typical, may or may not be consistent with the Board's repeated declaration that its findings are conclusive *if supported by substantial evidence*. Beginning this conclusion (*ante*, pp. 59-61) we quoted a number of the Board's statements declaring that substantial evidence to sustain the finding is essential. We believe that the language of this court in *N. L. R. B. v. Columbian Enameling and Stamping Co.*, 306 U. S. 292, 299, and *N. L. R. B. v. Southern Bell Tel. & Tel. Co.*, 319 U. S. 50, 51, is definitely to the same effect.

There is not substantial evidence in the record to sustain the court's finding either: (first) that newsboys engaged in street sales of the Los Angeles Times are its employees or (second) that the unit appropriate for collective bargaining purposes consists of those newsboys defined in the Board's decision and Direction of Elections. The Circuit Court of Appeals correctly decided the first of these contentions and accordingly its judgment should be affirmed.

Respectfully submitted,

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